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7 WELLS FARGO & COMPANY)

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

10
11 MONTE RUSSELL, on behalf of himself
and others similarly situated,

12 Plaintiff,

13 vs.

14 WELLS FARGO & COMPANY,

15
16 Defendants.

CASE NO. C 07-03993 CW

JUDGE CLAUDIA WILKEN
COURTROOM 2

**DEFENDANT WELLS FARGO
BANK, N.A.'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
CONDITIONAL COLLECTIVE
ACTION CERTIFICATION
UNDER FLSA, 29 U.S.C. § 216(b),
AND FOR COURT-APPROVED
NOTICE OF FLSA CLAIMS**

Hearing Date: September 4, 2008
Time: 2:00 p.m.
Location: Courtroom 2

Complaint filed: August 2, 2007

Trial Date: None set

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1 **I. SUMMARY OF DEFENDANT'S OPPOSITION**

2 **A. Plaintiff Unnecessarily Made the Task before the Court More Difficult and**
 3 **Less Efficient.**

4 Plaintiff has made the task before the Court more difficult and less efficient than
 5 necessary. First, Plaintiff made no effort to seek a stipulation on conditional certification
 6 and notice even though the parties previously stipulated to court approved notice to
 7 certain individuals *in this same lawsuit*. Had Plaintiff engaged Wells Fargo he would not
 8 have had to address many of the issues in his Motion because Wells Fargo does not
 9 oppose certain aspects of the relief sought (see below). Plaintiff then could have focused
 10 on the few issues on which the parties could not reach agreement.¹

11 Second, even absent that process, Plaintiff is well aware of certain issues for which
 12 the parties were in disagreement based on their discussions regarding the prior stipulation
 13 for court-approved notice. Therefore, those issues should have been clearly identified for
 14 the Court and Plaintiff's position set forth with factual and legal support. Instead, Plaintiff
 15 inexplicably submitted a brief that did not do so as though receipt of Wells Fargo's
 16 Opposition will be his first notice there is a disagreement on certain issues. A clear and
 17 concise list of the specific areas of disagreement, coupled with Plaintiff's factual and legal
 18 arguments in support of his position would have been better. It also would have afforded
 19 Wells Fargo the opportunity to respond to them, which it now will be unable to do.

20 **B. Summary of Wells Fargo's Position and Opposition to Plaintiff's Motion.**

21 Wells Fargo does not oppose *conditional* certification of a collective action that
 22 includes only the PC/LAN Engineer 3's and 4's and notice being sent to those PC/LAN
 23 Engineers 3 and 4 *who were not previously sent the notice approved by this Court*. While
 24 Wells Fargo contends that these employees were properly treated as exempt from the laws
 25 requiring payment of overtime and that the determination of whether these employees

26 _____
 27 ¹ Additionally, upon receipt of Plaintiff's Motion, Wells Fargo made several attempts to compromise with
 28 Plaintiff regarding the issues raised in his Motion. Its two written proposals were unconditionally rejected
 and Plaintiff made not one counter-proposal, nor a single concession.

1 were properly treated as exempt cannot be made on a collective basis, Wells Fargo will
2 not oppose conditional certification at this stage. Wells Fargo will oppose certification at
3 a later stage in the proceedings. Wells Fargo also opposes certain additional aspects of
4 Plaintiff's Motion.

5 ***First Significant Issue in Dispute:*** PC/LAN Engineer 3's and 4's who have
6 already been provided with notice and an opportunity to opt in to this action should not be
7 provided with a second notice. Plaintiff's Motion implicitly seeks that a second notice be
8 provided to these individuals who have already received notice but it lacks any factual
9 justification or legal authority for a second notice.

10 ***Second Significant Issue in Dispute:*** Conditional certification should not
11 include PC/LAN Engineer 5's because PC/LAN Engineer 5's are not "similarly situated"
12 to PC/LAN Engineer 3's and 4's. While Wells Fargo re-classified all PC/LAN Engineer
13 3's and 4's to non-exempt status, Wells Fargo did not similarly treat PC/LAN Engineer
14 5's. Indeed, Wells Fargo undertook an individualized person-by-person review of
15 PC/LAN Engineer 5's to confirm their proper classification as exempt. Moreover, even
16 though Plaintiff's burden for conditional certification is less onerous, the conjecture and
17 hearsay declarations of a few PC/LAN Engineers 3 and 4 concerning the duties of
18 PC/LAN Engineer 5's does not meet his burden.

19 ***Third Significant Issue in Dispute:*** Wells Fargo should not be ordered to
20 produce contact information regarding its current and former employees (who have a clear
21 right to privacy in that information) to Plaintiff's counsel. Notice, if it is ordered by this
22 Court, should be given by a third-party administrator as Plaintiff has previously agreed
23 was proper. Plaintiff previously agreed to notice by a third-party administrator in
24 connection with the first notice that was distributed in this case and has provided no
25 argument or evidence why such notice was not sufficient, or why he requires the contact
26 information of individuals in order for individuals to receive the "accurate" and "uniform"
27 content of Court-approved notice.
28

For the foregoing reasons, Wells Fargo respectfully requests that the Court deny Plaintiff's Motion and adopt Wells Fargo's proposed order: (1) denying Plaintiff's Motion with respect to PC/LAN Engineer 5's on the ground that they are not "similarly situated" to Plaintiff; (2) denying Plaintiff's Motion with respect to sending a second notice to PC/LAN Engineer 3's and 4's who have already received notice of this action and an opportunity to opt in to this action; (3) denying Plaintiff's request for contact information of putative collective action members; and (4) if notice is ordered, that it be distributed by a third party administrator by first class mail only, that it not be "corrective" and that the opt-in period be 60 days.

II. THE ACCURATE FACTUAL BACKGROUND: CORRECTION OF PLAINTIFF'S MIS-DESCRIPTION

In Plaintiff's Motion, Plaintiff goes to great lengths to portray Wells Fargo as an employer that tried to take advantage of its employees by "surreptitiously" offering them "improper and dramatically low" settlements behind Plaintiff's counsel's back. As will be more fully demonstrated below, Plaintiff's self-serving portrayal could not be further from the truth.

A. The Three Job Classifications at Issue – PC/LAN Engineer 3 (reclassified), PC/LAN Engineer 4 (reclassified), and PC/LAN Engineer 5 (not reclassified).

Plaintiff seeks conditional collective action certification of an "FLSA class" consisting of all employees who held the position of PC/LAN Engineer 3, 4, or 5. At the outset, it is important to note (since Plaintiff has not) that PC/LAN Engineers 3, 4, and 5 have not been treated identically by Wells Fargo. On July 22, 2007, all employees who held the position of PC/LAN Engineer 3 or 4 were re-classified to non-exempt status. See Dougherty Decl., ¶ 4. However, employees holding the position of PC/LAN Engineer 5 were not at that time and have not since been re-classified collectively to non-exempt status. See Dougherty Decl., ¶¶ 4-6. Furthermore, the process that was used to evaluate

1 the PC/LAN Engineer 3 and 4 positions was very different than the process that was used
2 to evaluate the PC/LAN Engineer 5 position as will be described *infra*.

3 **B. Wells Fargo's Good Faith Process to Voluntarily Pay Back Pay to**
4 **Employees Reclassified to Non-Exempt Status Was Followed with Respect**
5 **to PC/LAN Engineers 3 and 4.**

6 Wells Fargo Bank, N.A., employs approximately 165,000 individuals in the
7 United States in more than a thousand different job classifications. There have been other
8 times in past years in which individuals in a position have been reclassified from exempt
9 to non-exempt. The process followed with respect to the review and re-classification of
10 PC/LAN Engineer 3's and 4's was consistent with Wells Fargo's approach to other
11 reclassifications. See Dougherty Decl., ¶ 15.

12 **1. Wells Fargo's internal review of the PC/LAN Engineer positions started**
13 **before contact by Plaintiff Russell or his counsel.**

14 Plaintiff alleges in his Motion that Wells Fargo "surreptitiously" reclassified
15 hundreds of PC/LAN Engineers 3 and 4 to non-exempt status and attempted to settle with
16 them "behind the backs" of Russell and his counsel in response to a demand letter
17 received from Russell's counsel in April 2007. That is simply not true and, even though
18 Plaintiff has been told that it is not true, he continues to assert it in this Motion.

19 First, and most importantly, Russell's counsel did not file the Complaint in this
20 action until August 2007 and did not represent anyone other than Russell until
21 approximately late April 2008. See FLSA Consent Forms (ECF No. 30). Therefore,
22 Wells Fargo was not required to notify Russell or his counsel of its contacts with
23 unrepresented individuals. See, e.g., Gerlach v. Wells Fargo & Co., 2006 WL 824652, *6
24 (N.D. Cal. March 28, 2006) ("pre-certification communications with potential collective
25 action members are generally permitted").

26 Second, counsel for Plaintiff Russell initially contacted Wells Fargo regarding
27 Russell's claims in a letter dated April 25, 2007. See Plaintiff's Motion, Section II.E and
28 Exh. G. However, the process of reviewing and evaluating the duties performed by

1 employees in the PC/LAN Engineer 3 and 4 positions to determine whether or not they
 2 should continue to be classified as exempt from the laws requiring payment of overtime
 3 commenced *prior to April 25, 2007*. See Dougherty Decl., ¶ 3.

4 When the determination was made out of an abundance of caution to re-classify
 5 employees in the PC/LAN Engineer 3 and 4 positions to non-exempt status, Wells Fargo
 6 surveyed employees as to their hours worked, just as they have when they have made the
 7 same decision in the past with respect to other positions, and voluntarily paid them back
 8 pay based on the hours the employees themselves self-reported. See Dougherty Decl., ¶¶
 9 7-10, 15; Plaintiff's Motion, Exhs. J, K, L, N.²

10 **2. Wells Fargo accepted and did not dispute the hours self-reported by**
 11 **employees in calculating the payments.**

12 In his Motion, Plaintiff suggests that Wells Fargo did not make the back pay
 13 payments to its employees in good faith. Again, that is simply not the case.

14 Once Wells Fargo had determined that the employees holding PC/LAN
 15 Engineer 3 and 4 positions would be re-classified to non-exempt status, Wells Fargo
 16 distributed the "Team Member Hours Survey." For those individuals who currently held
 17 PC/LAN Engineer 3 and 4 positions, their supervisors distributed the surveys. For those
 18 individuals currently employed by Wells Fargo but no longer employed in PC/LAN
 19 Engineer 3 or 4 positions, the surveys were distributed by e-mail. See Dougherty Decl., ¶
 20 8 and Exh. A; Plaintiff's Motion, Exh. J. Employees were able to complete the surveys at
 21 home or other places completely free of supervision. See Dougherty Decl., ¶ 8.

22 The "Hours Survey" instructs employees to "answer the following questions
 23 honestly, accurately and completely..." Furthermore, the Hours Survey requests not only
 24 the average number of weekly hours regularly worked but also provides an opportunity

25 ² Plaintiff also makes much of the fact that the e-mail communication containing the hours survey was not
 26 sent to Russell – according to Plaintiff, another attempt to "end run" Russell and his counsel. What
 27 Plaintiff does not mention in his Motion (even though he is fully aware of it) is that the hours surveys were
 28 not distributed to any former employees of Wells Fargo. See Dougherty Decl., ¶ 7. It further defeats
 Plaintiff's "conspiracy theory" that the entire population of former employees were not contacted, thus
 ensuring that any ensuing litigation would continue at a minimum as to the employees not contacted.

1 for employees to identify weeks during which they worked significantly more or less than
2 the average indicated. See Dougherty Decl., Exh. A.

3 If, in the manager's estimation, the hours worked reported by the employee
4 were reasonable, as was the case with the vast majority of the employees, the employee's
5 back pay payment was calculated using the hours self-reported by the employee. If the
6 manager believed that the hours reported were unreasonable based on his or her
7 experience supervising the employee, there was a follow-up process with the employee.
8 Those employees were also paid the number of hours they agreed to in connection with
9 the follow-up process. See Dougherty Decl., ¶ 9.

10 **3. The payments were neither "dramatically low" nor "fallacious" as**
11 **misleadingly labeled by Plaintiff.**

12 Plaintiff labels the back pay payments made by Wells Fargo as "dramatically
13 low" and "fallacious." First, on their face, the payments are not "dramatically low" –
14 many of the back pay payments were in the range of \$20,000 to \$30,000, and some
15 exceeded \$50,000. See Dougherty Decl., ¶ 13.

16 Second, the explanation of how the back pay payments were calculated makes
17 clear that they are not "fallacious." Employees were paid for every hour of overtime they
18 self-reported for a two-year look back period for employees outside of California and a
19 three-year look back period for California employees. The only reduction was by 12% to
20 take into account paid time off ("PTO") and other time off, such as holidays. For a
21 company that provides six holidays and at least five weeks of PTO (the amount of PTO
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1 varies based upon the length of service but that is the minimum amount), that is more than
2 reasonable. See Dougherty Decl., ¶ 10; Plaintiff's Motion, Exhs. L and N.³

3 Plaintiff's primary justification for labeling the payments as "fallacious" is that
4 the payments did not include liquidated damages, they were based on a two-year look
5 back period for those performing services outside of California (rather than three years),
6 and that the payments were computed using the fluctuating workweek method for those
7 outside of California.

8 Plaintiff states in his Motion that Wells Fargo's payments were "required" to
9 include liquidated damages. See Plaintiff's Motion, Section II.F. Not so. Liquidated
10 damages are neither required nor automatically awarded under the FLSA. The decision of
11 whether to award liquidated damages lies within the sound discretion of the trial court.
12 See Bratt v. County of Los Angeles, 912 F.2d 1066, 1071 (9th Cir. 1990) ("the Court may,
13 in its sound discretion, award no liquidated damages or award any amount thereof not to
14 exceed the amount specified in Section 216"). If the employer shows that the act or
15 omission giving rise to the FLSA violation was in good faith, the court may exercise its
16 discretion to award no liquidated damages. See id.

17 Furthermore, Plaintiff asserts that Wells Fargo should have used a three year
18 look back period based on a three year statute of limitations under the FLSA. Again, a
19 three year statute of limitations is not the standard under the FLSA but rather is reserved
20 for cases in which violations are found to be "willful." See 29 U.S.C. § 255(a).

21 Finally, Plaintiff takes issue with the payment of overtime to employees
22 performing services outside of California calculated on a fluctuating workweek basis,

23 ³ Furthermore, Wells Fargo's good faith is demonstrated by the following fact: if Wells Fargo had not
24 voluntarily made back pay payments to its employees and rather had addressed the issue through Russell's
25 counsel, the result would have been a motion to conditionally certify a putative collective action several
26 months later. If that motion was granted and notice was distributed, it is likely that approximately 25% of
27 employees would have opted in to the action and, by then, several months (at least) of the statute of
28 limitations would have run. As a result, many people who Wells Fargo ensured received a payment never
would have opted in to the lawsuit and never would have received a nickel. The only person that would
benefit more had Wells Fargo not paid anyone and gone that route is Russell's counsel. Perhaps that
explains the repeated criticism of Wells Fargo following its well-established practice of voluntarily
making back pay payments.

1 rather than using a time-and-a-half method. What Plaintiff does not mention is that the
 2 clear weight of authority in the federal courts, including all published circuit court
 3 opinions on the issue, support Wells Fargo's payment of overtime using a fluctuating
 4 workweek method. See Tumulty v. Fedex Ground Package Sys., Inc., 2005 WL 1979104,
 5 *4 (W.D. Wash. Aug. 16, 2005) ("[t]he First and Fifth Circuits have both held that
 6 employers who inappropriately misclassified an employee as exempt from the FLSA may
 7 rely on § 778.114 [which allows the fluctuating workweek calculation] to determine
 8 overtime due because the employees understood that they would be paid a fixed weekly
 9 salary regardless of the hours worked") (citing Valerio v. Putnam Assoc. Inc., 173 F.3d
 10 35, 39-40 (1st. Cir. 1999) and Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138
 11 (5th Cir. 1988)).⁴

12 In sum, it appears the only way to avoid Plaintiff's label of "dramatically low"
 13 and "fallacious" would be to assume every single factual and legal issue, including "long
 14 shot" issues, were 100% certain to be resolved in the affected employee's favor.

15 **4. Nothing prohibited Wells Fargo from communicating with**
 16 **unrepresented individuals about settlement.**

17 Plaintiff asserts that Wells Fargo's back pay payments were improper but does
 18 not cite a single case holding that an employer is prohibited from communicating with
 19 unrepresented employees regarding settlement. In fact, in his Motion, Plaintiff cites
 20 Gerlach v. Wells Fargo & Co., 2006 WL 824652, *6 (N.D. Cal. March 28, 2006), in
 21 which *this* Court acknowledges that "pre-certification [employer] communications with
 22 potential collective action members are generally permitted." *The communications*
 23 *alleged by Plaintiff to be improper were not only pre-certification but pre-lawsuit. See*
 24 *also, e.g., O'Brien v. Encotech Constr. Serv. Inc.*, 203 F.R.D. 346, 349 (N.D. Ill. 2001)

25 _____
 26 ⁴ See also Bailey v. County of Georgetown, 94 F.3d 152, 156-57 (4th Cir. 1996) (rejecting the proposition
 27 that "an employee must also understand the manner in which his or her overtime pay is calculated" as
 28 contrary to Section 778.114); Clements v. Serco, Inc., 530 F.3d 1224, 1230-31 (10th Cir. 2008) (holding
 that the fluctuating workweek method is the proper method to determine back pay for misclassified
 employees).

1 (“[A] defendant is allowed to settle with individual plaintiffs before a federal class action
 2 is certified.”); In re Painewebber Ltd. Partnerships Litig., 147 F.3d 132, 137 (2d Cir.
 3 1998) (acknowledging the right of a defendant to settle with potential class members prior
 4 to certification without prior court approval). Although Plaintiff attempts to portray Wells
 5 Fargo’s back pay payments to its employees as improper, he cites no authority.

6 **5. Not a single person was required to sign an FLSA release in order to**
 7 **receive payment – another important fact misstated by Plaintiff.**

8 Plaintiff’s misstatements of fact continue. In his Motion, he asserts that “Wells
 9 Fargo required those PC/LAN Engineers who wished to accept Wells Fargo’s back pay
 10 offer to first sign a purported release of their FLSA claims.” See Plaintiff’s Motion,
 11 Section II.F. Again, simply not true. First, a simple reading of the release documents
 12 reveals that the releases do not purport to release FLSA claims. See Dougherty Decl., ¶
 13 14 and Exhs. B and C. Second, Wells Fargo distributed all back pay payments
 14 concurrently with a release form. At no time prior to that communication or as part of that
 15 communication did Wells Fargo indicate that an employee would be required to sign the
 16 release. See Dougherty Decl., ¶ 12.

17 **6. PC/LAN Engineer 5’s were not converted to non-exempt status – a**
 18 **significant fact disguised by ambiguity in Plaintiff’s Motion.**

19 In conjunction with Wells Fargo’s review of the PC/LAN Engineer 3 and 4
 20 positions, the PC/LAN Engineer 5 position was also reviewed. Wells Fargo made the
 21 determination following its review that the individuals in the PC/LAN Engineer 5 position
 22 were properly classified as exempt but, in order to ensure that each incumbent holding the
 23 PC/LAN Engineer 5 position was performing the position in an exempt manner, Wells
 24 Fargo conducted an individualized review of the job duties being performed by each
 25 employee holding the position of PC/LAN Engineer 5. Based on these individualized
 26 reviews of individual PC/LAN Engineer 5’s, some individuals were reclassified as non-
 27 exempt and reassigned to a position more reflective of their duties. See Dougherty Decl.,
 28 ¶ 5.

**C. A Significant Portion of the “Collective Action” Now Proposed by Plaintiff
Has Already Received Notice and the Opt-In Period Has Closed.**

The back pay payment process outlined above resulted in two distinct groups of PC/LAN Engineer 3’s and 4’s: (1) a group of PC/LAN Engineer 3’s and 4’s who have completed an “hours survey” and have received a back pay payment from Wells Fargo; and (2) a smaller group of PC/LAN Engineer 3’s and 4’s who have not received a back pay payment from Wells Fargo, most of whom did not receive a back pay payment because they were no longer employed by Wells Fargo at the time of the back pay process.⁵

Earlier in this case, the parties stipulated to send notice to the smaller group of employees who had held a PC/LAN Engineer 3 or 4 position during the relevant time period and who had not received a back pay payment from Wells Fargo. See Plaintiff’s Motion, Section II.G.; Stipulation as to Form and Dissemination of Collective Action Notice (ECF No. 22). A third party administrator selected and agreed to by the parties sent notice of this action in a form approved by this Court to those individuals which provided them with 45 days to opt in to this action. 24 of the individuals who received notice chose to opt in to this action. See Plaintiff’s Motion, Section II.G.; Stipulation as to Form and Dissemination of Collective Action Notice (ECF No. 22).

Despite the fact that these individuals have already received notice, Plaintiff seeks as part of this Motion that they be provided with a second notice and a second opportunity to opt in. While Plaintiff references in his Motion that there is a group of individuals who have received prior notice, he provides no argument or authority of any kind why a second notice is necessary, desirable or proper.

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⁵ A few individuals indicated in their “hours surveys” that they worked 40 or fewer hours per week. Accordingly, they would have no potential claim to overtime and they were not paid any back pay.

D. Despite the Parties' Prior Success in Reaching a Stipulation, Plaintiff Made No Effort to Contact Wells Fargo Prior to Filing the Instant Motion.

As above, the parties have worked together on several significant matters in this case, including the stipulated notice outlined above with respect to those PC/LAN Engineer 3's and 4's who have not received a back pay payment. Nonetheless, Plaintiff's counsel did not make any effort to meet and confer with Wells Fargo's counsel prior to filing this Motion. See Briggs Decl., ¶ 2. While there is no meet and confer requirement in the Northern District local rules, it benefits the Court and behooves all parties to attempt to resolve issues without resorting to motion practice, thus preserving party and Court resources. Even if agreement is not reached on all issues, the process of meeting and conferring has the potential to result in partial agreement, thus focusing issues for the Court. Perhaps Plaintiff did not want to be in a position to squarely address issues that would have arisen as part of those discussions, such as providing a second notice to individuals who have already received notice.

E. Wells Fargo's Proposed Compromises Were Generously Reasonable And Wells Fargo Received Two Non-Negotiable Rejections.

Despite Plaintiff's counsel's failure to meet and confer, Wells Fargo attempted to compromise regarding the issues raised in Plaintiff's Motion upon receipt of it, in an attempt to conserve the time and resources of the parties and the Court. Wells Fargo's proposal with respect to this Motion was the following: (1) Wells Fargo would stipulate to mutually agreed upon notice (similar to the notice the parties had previously agreed upon) being sent to those individuals who held a PC/LAN Engineer 3 or 4 position during the relevant time period and who had not previously received notice; (2) while the notice would not be "corrective," it would advise individuals that they could join the lawsuit even if they had previously received a back pay payment and/or signed a release document; (3) notice would be sent by the same third-party administrator used with the previous notice; and (4) individuals would have 60 days to opt in to the action.

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1 In other words, the only compromises asked of Plaintiff were that: (1)
2 employees who held a PC/LAN Engineer 5 position during the relevant time period, who
3 are not similarly situated with PC/LAN Engineer 3's and 4's, would not receive notice;
4 (2) individuals who held PC/LAN Engineer 3 or 4 positions who had already received
5 notice would not receive a second notice; (3) notice would be sent by a third-party
6 administrator and not Plaintiff's counsel (and contact information would therefore not be
7 provided to Plaintiff's counsel); and (4) there would be a 60-day opt in period rather than
8 a 120-day opt in period. See Briggs Decl., ¶ 3 and Exh. A.

9 Wells Fargo's proposal was rejected unconditionally by Plaintiff's counsel. In
10 response to Plaintiff's counsel's rejection, Wells Fargo made yet another proposal to
11 compromise the issues raised in Plaintiff's Motion. In addition to the terms of the
12 proposal outlined above, Wells Fargo made two additional concessions: (1) that notice
13 would be sent to PC/LAN Engineer 5's; and (2) that the opt-in period would be 75 days.
14 With Wells Fargo's second proposal, the only two things Plaintiff was being asked to
15 compromise on were: (1) those who received notice previously would not receive a
16 second notice; and (2) notice would be sent by a third-party administrator (and contact
17 information would therefore not be provided to Plaintiff's counsel). See Briggs Decl., ¶¶
18 4-5 and Exh. B. That proposal was also rejected out of hand by Plaintiff's counsel in a
19 telephone conversation that lasted less than one minute, during which Plaintiff's counsel
20 did not speak one word as to why this proposed compromise was inadequate. See Briggs
21 Decl., ¶ 5.

22 Wells Fargo's proposals were made in the spirit of compromise. However,
23 because Plaintiff's rejection of Wells Fargo's more than reasonable proposals has forced
24 Wells Fargo to oppose his Motion, Wells Fargo disputes that notice should be sent to
25 PC/LAN Engineer 5's because they are not similarly situated to PC/LAN Engineer 3's
26 and 4's.

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1 **III. CONDITIONAL CERTIFICATION SHOULD NOT BE EXTENDED TO**
 2 **PC/LAN ENGINEER 5'S BECAUSE THEY ARE NOT "SIMILARLY**
 3 **SITUATED" TO PLAINTIFF**

4 As above, PC/LAN Engineer 5's are not "similarly situated" to Plaintiff, who
 5 held the position of PC/LAN Engineer 3, or the other declarants, all of whom were either
 6 PC/LAN Engineers 3 or 4. Therefore, conditional certification should not be extended to
 7 employees who hold or have held a PC/LAN Engineer 5 position during the relevant time
 8 period.

9 **A. The Governing Standard for Conditional Certification Is Not "Automatic".**

10 Plaintiff himself states the standard that has been applied in this Court – that
 11 "putative class members were together the victims of a *single decision, policy, or plan.*"
 12 See Plaintiff's Motion, Section IV.A.1 (quoting Thiessen v. Gen. Elec. Capital Corp., 267
 13 F.3d 1095, 1102 (10th Cir. 2001)) (emphasis added). However, it is not the case, as
 14 Plaintiff suggests, that an employer's decision to classify a group of employees with the
 15 same title or titles as "exempt" is sufficient to meet the "similarly situated" standard.
 16 Courts look to various factors to determine whether proposed class members are similarly
 17 situated, including "the extent to which the members of the proposed action will rely on
 18 common evidence." Trinh v. JP Morgan Chase & Co., 2008 WL 1860161, *3 (S.D. Cal.
 19 Apr. 22, 2008). By its very nature, a determination of whether or not an employee is
 20 "exempt" or "non-exempt" depends upon an analysis of each individual employee's job
 21 duties and defies the use of "common evidence." See id. at *4 (denying conditional
 22 certification; "whether or not an employee is 'exempt' under relevant labor laws involves
 23 an analysis of each individual [employee's] daily duties and compensation and whether
 24 they meet several statutory and administrative exemptions").

25 **B. PC/LAN 5's Are Not "Similarly Situated" to Plaintiff.**

26 As outlined *supra*, PC/LAN Engineer 3's and 4's were the subjects of a
 27 different "decision" and "plan" than were PC/LAN Engineer 5's – in fact, entirely
 28 opposite decisions. While the decision was made to re-classify PC/LAN Engineer 3's and

1 4's to non-exempt status, the decision was made that PC/LAN Engineer 5's were properly
2 classified as exempt. In fact, every person who holds a PC/LAN Engineer 5 position has
3 been individually determined to be properly classified as exempt. See Dougherty Decl., ¶
4 5; see also Olivo v. GMAC Mortgage Corp., 374 F. Supp.2d 545 (E.D. Mich. 2004)
5 (denying conditional certification because the defendant employer provided evidence that
6 the proposed class met the exemption requirement and, therefore, were not "similarly
7 situated" to the plaintiff).

8 They were determined to be properly classified as exempt because of the duties
9 that they perform every day. They are expected to and do engage in duties including (1)
10 server engineering, including designs and specialized builds of servers and server
11 environments; (2) recommending and designing hardware, software, and other tools in a
12 server environment that will positively impact users; (3) interfacing with other
13 departments and groups to roll out new tools and technologies, including pulling in
14 resources and determining the order for the roll out within the team that will best ensure
15 that the impact of any change to the environment is minimized; (4) acting as a team lead,
16 including mentoring lower level individuals and providing feedback to managers
17 regarding employee performance; (5) identifying risks that may exist within the
18 environment and developing and recommending resolutions; (6) providing input regarding
19 modifications to internal processes, including security specifications; (7) acting as team
20 lead for complex projects, including tool design projects; (8) coordinating with
21 "customers" and other teams to determine how an application will best work in an
22 environment and how to integrate a new application in compatibility with the
23 environment. See Farrington Decl., ¶ 5. These duties clearly require the regular and
24 consistent exercise of discretion and independent judgment.

25 Furthermore, the day to day duties performed by PC/LAN Engineer 5's are
26 different than the day to day duties performed by PC/LAN Engineer 3's and 4's. See
27 Farrington Decl., ¶ 4. In his Motion and the declarations he submitted in support of his
28 Motion, Plaintiff identified the duties of PC/LAN Engineer 3's and 4's as "provid[ing]

1 computer support services,” “server support involving patching, updating, and repairing,”
2 “fixing or troubleshooting computer hardware and installing software,” and
3 “implementing changes to computer hardware.” Plaintiff and his fellow declarants assert
4 that they performed their duties “according to predetermined instructions or
5 specifications.” See Exhibits A through F to Snodgrass Declaration.

6 PC/LAN Engineer 5’s rarely if ever perform any of those duties identified by
7 Plaintiff and the other declarants. See Farrington Decl., ¶ 6. They are only involved in
8 troubleshooting if there is a complex problem that several other people have tried to
9 resolve and have been unable to do so. PC/LAN Engineer 5’s are not constrained by pre-
10 determined instructions, specifications or procedures in performing their jobs. See
11 Farrington Decl., ¶ 6.

12 It is clear that the duties performed by PC/LAN Engineer 5’s are very different
13 than the duties performed by PC/LAN Engineer 3’s and 4’s because, after an audit by
14 Wells Fargo of the duties performed by individuals in these positions, PC/LAN Engineer
15 3’s and 4’s were re-classified to non-exempt status and PC/LAN Engineer 5’s were
16 determined to be properly classified as exempt. See Dougherty Decl., ¶ 4. It defies logic
17 to reclassify the vast majority of the PC/LAN Engineer population (the 3’s and the 4’s),
18 yet continue the exempt classification of PC/LAN Engineer 5’s unless there existed a
19 *bona fide* distinction.

20 Furthermore, Plaintiff has not provided any admissible or probative evidence
21 regarding the “similarly situated” standard with respect to PC/LAN Engineer 5’s other
22 than conclusory statements in declarations of individuals who held PC/LAN Engineer 3
23 and/or 4 positions that they, although never holding a PC/LAN Engineer 5 position,
24 “came to know” PC/LAN Engineer 5’s and their duties are similar. See Plaintiff’s
25 Motion, Section II.C. Not one of the named plaintiffs or declarants has held the position
26 of PC/LAN Engineer 5. See Plaintiff’s Motion, pg. 4, lns. 4-7 (admitting that the
27 declarants held the titles PC/LAN Engineer 3 and 4). Conclusory declarations are not
28 sufficient to show that a plaintiff is “similarly situated” to the class he or she seeks to

1 represent in connection with an FLSA collective action. See, e.g., Trinh v. JP Morgan
 2 Chase & Co., 2008 WL 1860161, *3 and *4 (S.D. Cal. Apr. 22, 2008) (holding that
 3 conclusory declarations are not sufficient to establish “similarly situated”; “*Plaintiffs*
 4 *provide no real evidence*, beyond their own speculative beliefs, suggesting that all ... loan
 5 officers across the country, regardless of location or experience, receive the same
 6 compensation and are required to work in the same manner.”) (emphasis added).

7
 8 **IV. PC/LAN ENGINEERS 3 AND 4 WHO ALREADY RECEIVED NOTICE**
 9 **AND AN OPPORTUNITY TO OPT IN SHOULD NOT GET A SECOND**
 10 **NOTICE**

11 Plaintiff explains the purpose of notice to putative collective action members in
 12 his Motion as twofold – first, to provide potential collective action members an
 13 opportunity to “make informed decisions about whether to participate” and, second, to
 14 facilitate tolling of the statute of limitations for individual collective action members
 15 because the statute of limitations is not tolled until an employee opts in to the action. See
 16 Plaintiff’s Motion, Section IV.A. and IV.B. The PC/LAN Engineers 3 and 4 who did not
 17 receive a back pay payment have already been given an opportunity to make an informed
 18 decision about whether to opt in and have been fully informed that the statute of
 19 limitations will continue to run unless they opt in. In fact, they were given that
 20 opportunity in the form of a notice agreed to by Plaintiff and approved by this Court.

21 Plaintiff has not explained anywhere in his Motion why it is necessary for these
 22 PC/LAN Engineers 3 and 4 who have already received notice to receive a second notice.
 23 And yet, Plaintiff includes them in the group to which he seeks notice to be sent. See
 24 Plaintiff’s Motion, Section IV.A.

25 There is no legal authority justifying a second notice to individuals who have
 26 already received notice and an opportunity to opt in to an action. See, e.g., In re Wells
 27 Fargo Loan Processor Overtime Pay Litig., 2008 WL 2397424, *4 (N.D. Cal. June 10,
 28 2008) (finding it improper to merge two similar cases where one action had already had

1 notices sent out and where the opt-in period had already expired; “To now merge the two
2 collective actions would conflate the issues and class members and would amount to a
3 ‘do-over’ of the [first] collective action.”).

4 Moreover, courts have allowed a second notice only where some form of
5 remedial or “corrective” notice is warranted by an inaccurate or coercive communication
6 about the lawsuit. Not one single published decision allows “do-over” notice.

7
8 **V. THE NOTICE PROCESS SHOULD BE ADMINISTERED BY A THIRD-**
9 **PARTY ADMINISTRATOR**

10 In his Motion, Plaintiff requests that the Court order Wells Fargo to provide
11 contact information for all putative members of the “FLSA class” to Plaintiff’s counsel for
12 purposes of distributing notice to those individuals. See Plaintiff’s Motion, Section
13 IV.B.1., pg. 16. Plaintiff has provided no reason in his Motion why notice through a
14 third-party administrator would not be sufficient. In fact, Plaintiff emphasizes in his
15 Motion that the purpose of Court-approved notice is that the notice is “accurate” and
16 “uniform.” See Plaintiff’s Motion, pg. 16, Ins. 1-10. Those two purposes are ideally
17 served by notice through a third-party administrator, which also serves the purpose of
18 protecting the privacy rights of individuals who have not yet chosen to be a part of this
19 action.⁶

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26 ⁶ If Plaintiff objects to the third-party administrator on the basis of cost, Defendant is willing to pay for the
27 costs associated with the third-party administrator in order to alleviate that concern and protect its
28 employees’ privacy rights. See Stanfield v. First NLC Financial Servs., LLC, 2006 WL 3190527, *5
(N.D. Cal. 2006) (rejecting an employer’s request for a third-party administrator on the sole grounds that it
would add to the plaintiffs’ “financial burden”).

1 **A. Plaintiff Previously Agreed to a Third-Party Administrator for the First**
 2 **Notice.**

3 The initial notice that was sent out in this matter to PC/LAN Engineer 3's and
 4 4's who have not received a back pay payment from Wells Fargo was sent out through a
 5 third-party administrator selected by the parties. See Stipulation as to Form and
 6 Dissemination of Collective Action Notice (ECF No. 22). Plaintiff agreed that notice in
 7 that manner was sufficient and the notice process was approved by this Court. Plaintiff
 8 has not provided, and cannot provide, any evidence that the notice process that was
 9 utilized with respect to the first group of individuals who received notice was improper or
 10 insufficient. Furthermore, Plaintiff has provided no evidence why a different notice
 11 process is necessary for notice to this second group of individuals.

12 **B. Production of Contact Information Would Render Court-Approved Notice**
 13 **Superfluous.**

14 In his Motion, Plaintiff does not outline any reason for his request that the
 15 Court order production of contact information other than to send notice to members of the
 16 putative collective action. If that is Plaintiff's only intent, then producing the names and
 17 addresses to a third-party administrator would serve the same purpose. In fact, a third-
 18 party administrator has access to resources to which Plaintiff does not, such as change of
 19 address registries, and specializes in these processes.

20 If, however, Plaintiff intends to use that contact information to have contact
 21 with putative class members beyond the Court-approved notice, then Court-approved
 22 notice is superfluous. The purpose of Court-approved notice, even as stated by Plaintiff,
 23 is accurate and uniform notice. If Plaintiff intends to have contact with the putative
 24 members of the collective action outside of the notice, then the communications are no
 25 longer uniform and there is no Court oversight to ensure that they are accurate.

26 Furthermore, Plaintiff is not entitled to discovery of names and addresses of
 27 potential collective action members prior to the completion of the opt-in process. In
 28 Woods v. New York Life Ins. Co., 686 F.2d 578 (7th Cir. 1982), the distinguished Judge

1 Posner articulates his view (supported by the U.S. Supreme Court in Hoffman-LaRoche
2 Inc. v. Sperling, 493 U.S. 165 (1989)) that, once the case is filed, the Court has the
3 authority to supervise all communication with potential collective action members:

4 After suit was filed, however, we do not think it would have been
5 proper for [plaintiff] or his counsel to have sent out such
6 initiations [to join the lawsuit] without first communicating to the
7 defendant's counsel his intention to do so, so that the defendant's
8 counsel would have an opportunity to verify the accuracy of the
9 notice, and if he wished, to move for an order amending the
10 notice or limiting its distribution in an appropriate manner.

11
12 Woods, 686 F.2d at 580. Furthermore, in Torres v. CSK Auto, Inc., 2003 U.S. Dist.
13 LEXIS 25092 (W.D. Tex. 2003), the Court denied Plaintiffs' request for names and
14 addresses of potential "opt in" plaintiffs citing privacy concerns and ordered *defendants* to
15 give notice to its employees in a letter approved by plaintiff's counsel. This approach is
16 of course consistent with the foundation of the FLSA provisions requiring both judicial
17 approval of notice and supervision of the process. Delivery of all names and addresses to
18 counsel for Plaintiff would render this process superfluous and unnecessary.⁷

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27 ⁷ At this point, Plaintiff also represents 25 individuals and has not asserted that he needs contact
28 information for discovery. In any event, that would need to be addressed through a discovery motion and
not simultaneously with the notice process.

C. Plaintiff's Counsel Will Be Listed in the Notice and Is Free to Speak To Anyone; Wells Fargo Has Never Proposed a Gag Order on Plaintiff's Counsel.

Wells Fargo does not assert in this Opposition that Plaintiff's counsel should be prohibited from contact with putative members of the collective action.⁸ Furthermore, Wells Fargo does not disagree that Plaintiff's counsel's contact information should be provided in the notice so that members of the putative collective action can contact Plaintiff's counsel if they wish to do so. Wells Fargo's interest is twofold: (1) the privacy rights of its employees and former employees with respect to their names, home addresses, home telephone numbers, e-mail addresses, and social security numbers, all of which is requested by Plaintiff;⁹ and (2) that the primary substance of information communicated to potential collective action members is that contained in the court-approved notice.

Wells Fargo also does not propose that this is just a one-way street – in order to ensure that the court-approved notice is the primary source of information, as part of Wells Fargo's proposed compromise, one term of which was notice through a third-party administrator, Wells Fargo also indicated its willingness to agree to not initiate any contact with individuals receiving notice about the opt-in process during the opt-in period. See Briggs Decl., Exh. B. Wells Fargo remains willing to agree to such a restriction provided putative collective action members' contact information is provided solely to a third-party administrator for distribution of notice.

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⁸ In prior discussions, Plaintiff's counsel has claimed he has a "First Amendment right" to contact information. However, there is a fundamental difference between the Constitutional right to free speech, on the one hand, and arguing that the Constitution requires an employer to turn over contact information for anyone with whom Plaintiff's counsel desires to speak, on the other hand, in complete disregard of another Constitutional right – the right to privacy. Wells Fargo has never proposed any condition that infringes Plaintiff's counsel's free speech.

⁹ A California employer has an affirmative obligation to assert the privacy rights of its current and former employees. See, e.g., Boler v. Superior Court, 201 Cal. App.3d 467, 472 n.1 (1987).

VI. ADDITIONAL ASPECTS OF PLAINTIFF'S MOTION THAT SHOULD BE REJECTED

A. A 120-Day Opt-in Period Is Excessive; 60 (or 75 Days) Is Adequate.

In his Motion, Plaintiff requests a 120 day opt-in period. Plaintiff provides no argument why a 120 day opt-in period is necessary and no authority allowing for a 120-day opt-in period.¹⁰ Furthermore, when the parties agreed to the previous notice that was sent in this case, the opt-in period was 45 days, an admission by Plaintiff that 45 days is sufficient notice. This Court has held previously that a 120-day opt-in period is "too long." Gerlach v. Wells Fargo & Co., 2006 WL 824652, *4 (N.D. Cal. March 28, 2006) (setting a 75-day opt in period; "Plaintiffs' proposed 120 day deadline for potential class members to file their consents is too long."); see also Stanfield v. First NLC Financial Servs., LLC, 2006 WL 3190527, *5 (N.D. Cal. 2006) (approving a 60-day opt in period).

B. "Corrective" Notice Is Not Justified Where There Has Been No Abuse by Wells Fargo.

Plaintiff asserts in his Motion that "corrective notice" is justified in this case because of Wells Fargo's back pay payments to its employees. In support of his request for such "corrective notice," Plaintiff cites only one case -- O'Brien v. Encotech Const. Serv., Inc., 203 F.R.D. 346 (N.D. Ill. 2001). O'Brien is distinguishable on several grounds. First, Plaintiff implies that the Court in Encotech held that corrective notice must be sent. That is not the case. The Court denied the plaintiffs' motion for a corrective notice as moot because the defendant agreed that a corrective notice would be sent. See id. at 350. Furthermore, the factual situation in O'Brien is distinguishable. In O'Brien, the employer met with each employee one on one, offered each employee a check for "some additional compensation" that was not tied in any way to the potential unpaid wages, gave the employee a release and asked them to sign it immediately.

¹⁰ In fact, Plaintiff emphasizes in his Motion that notice is necessary because the statute of limitations is running for each putative collective action member until he or she opts in to the action. A longer opt-in period means that the statute of limitations is running for a longer period of time.

1 Furthermore, the plaintiffs provided evidence that some management employees believed
2 that employees who did not sign the releases would be laid off. Finally, the employer
3 unilaterally sent out notice to the putative collective action members describing the
4 lawsuit. See id. at 348.

5 None of the facts present in O'Brien are present in the instant case. Most
6 importantly, Wells Fargo made back pay payments to its employees based on hours
7 worked *self-reported* (and almost uniformly unquestioned) by those employees, the
8 process was written and not face-to-face, and Wells Fargo did not require any employee to
9 sign a release. There is no evidence that any employee felt coerced or pressured in any
10 way in connection with the "hours survey," the back pay payment, or the release
11 document that they were requested to sign. Finally, Wells Fargo has not distributed any
12 notice to any putative collective action member describing the lawsuit.

13 Wells Fargo nonetheless continues to be reasonable and agrees that notice, if it
14 is ordered, can contain a provision informing putative collective action members that they
15 can join the lawsuit even if they have previously received a back pay payment from Wells
16 Fargo and/or if they have signed a release document. However, the notice should also
17 provide that employees who have previously received a back pay payment may not
18 receive any additional compensation from joining the lawsuit and that Wells Fargo is
19 entitled to an off-set for any back pay it has already paid to them.

20 Attached as Exhibit C to the Declaration of Glenn Briggs, served and filed
21 concurrently herewith, is the notice proposed by Wells Fargo if notice is ordered by this
22 Court. The notice is identical to the notice that was previously agreed to by the parties
23 and that was previously approved by this Court, except for the provisions outlined above
24 with respect to previous back pay payments. The notice is "red-lined" to show the minor
25 differences between the notice proposed by Wells Fargo in connection with this Motion
26 and the notice that was previously approved by the Court in this matter, which primarily
27 reflect the changed procedural posture of the case.
28

1 **C. Plaintiff Has Not Demonstrated the Need for Notice by Posting or Payroll**
 2 **Distribution.**

3 Plaintiff requests that the Court order not only the mailing of notice to putative
 4 collective action members but also that Wells Fargo post notice at work locations and
 5 distribute notice through its payroll. The reasons given by Plaintiff as to why notice by
 6 posting or payroll distribution is necessary is that the “database may have errors and
 7 because potential plaintiffs may discard the notice, unaware of its significance.” Plaintiff
 8 was not concerned about these potential issues when the first notice was distributed by
 9 first-class mail only and has not provided any examples where these concerns arose in
 10 connection with the first notice that was distributed in this case.

11 In Adams v. Inter-Con Sec. Systems, Inc., 242 F.R.D. 530, 541-42 (N.D. Cal.
 12 2007), a case cited by Plaintiff in his Motion, the Court noted that “[f]irst class mail is
 13 ordinarily sufficient to notify class members who have been identified.” (citing Romero
 14 v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 492-93 (E.D. Cal. 2006)). In Romero, the
 15 primary case cited by Plaintiff, the Court ordered notice to be posted, in addition to being
 16 distributed by mailing, because the defendant employer had failed to provide contact
 17 information for some putative members of the collective action. Plaintiff has provided no
 18 evidence specific to this case that would justify notice by any method other than first class
 19 mail. Plaintiff has not cited any case in which the court ordered notice to be provided
 20 through the payroll process.¹¹

21 **D. The Court Should Not Invalidate Releases of Non-FLSA Claims.**

22 In Plaintiff’s memorandum of points and authorities, he casually requests that
 23 the Court “invalidate all releases entered into by similarly situated employees.” See
 24 Plaintiff’s Motion, pg. 17, Section IV.B.2.¹² Plaintiff provides no authority that would

25 ¹¹ It is worth noting at this point that, in response to Wells Fargo’s two proposed compromises to avoid
 26 this motion practice, Plaintiff was not even willing to compromise this extraordinary relief for which there
 is neither a factual justification nor legal authority.

27 ¹² Plaintiff has not included this request in his notice of motion and it is also not part of the proposed order
 28 on the Motion submitted by Plaintiff. Furthermore, this Motion is not the procedurally proper method for
 challenging the validity of these releases.

1 support such a result. Wells Fargo never asserted that the releases signed by individual
 2 employees unsupervised by a court or the Department of Labor are valid as to FLSA
 3 claims and, for that reason, the releases that employees were requested to sign do not
 4 purport to include FLSA claims. However, even if the releases expressly included FLSA
 5 claims, only the FLSA portion would be invalid. See, e.g., Encotech, 203 F.R.D. at 349
 6 (“Only the FLSA portion of the release is invalid. The court cannot declare the rest of the
 7 releases invalid without proof of fraud, duress, or misrepresentation. The court sees no
 8 reason why it cannot practicably sever the invalid portions of the releases.”).

9 **VII. THE COURT SHOULD DISREGARD ANY NEW ARGUMENT OFFERED**
 10 **BY PLAINTIFF DUE TO HIS INEXCUSABLE FAILURE TO BRIEF**
 11 **MATTERS HE KNEW WOULD BE DISPUTED ISSUES**

12 It is almost as though there was a pink elephant in Plaintiff’s presence when
 13 he wrote this Motion, but he decided to ignore it. Instead, Plaintiff chose to write a
 14 motion that does not directly address several material matters that he knew for certain
 15 would be disputed, apparently hoping to slip them by Wells Fargo and/or the Court, or
 16 alternatively, deprive Wells Fargo of a fair opportunity to respond to his arguments.
 17 Indeed, if these matters were important enough to include in Plaintiff’s proposed order,
 18 they warranted being addressed in the brief and supported with facts and law. The
 19 following are several examples:

- 20 • **Notice to PC/LAN Engineer 5’s:** Plaintiff clearly knew this would be
 21 an issue because the parties discussed it previously. See Briggs Decl., ¶
 22 7.
- 23 • **Production of contact information to Plaintiff’s counsel during the**
 24 **opt-in process:** In connection with the first notice that was distributed
 25 in this case, Wells Fargo refused to agree to provide Plaintiff’s counsel
 26 the contact information for those individuals receiving notice. This point
 27 was discussed on more than one occasion, and Wells Fargo’s position
 28

1 did not waver. In connection with those discussions, Wells Fargo
 2 asserted some of the same points set forth herein. See Briggs Decl., ¶ 8.

- 3 • **Use of a third-party administrator to send notice:** Wells Fargo
 4 similarly refused to agree in connection with the first notice that was
 5 distributed in this case to a notice procedure that entailed Plaintiff's
 6 counsel's office mailing the notice. See Briggs Decl., ¶ 8.
- 7 • **Second notice to PC/LAN Engineers 3 and 4 who already received**
 8 **notice:** A second notice in an FLSA collective action is an extraordinary
 9 request. Counsel experienced in FLSA collective actions would know
 10 that a defendant employer would not agree to it. See Briggs Decl., ¶ 9.

11 Nonetheless, Plaintiff has not squarely addressed any of these issues in his
 12 Motion. Wells Fargo anticipates that he will attempt to do so in his reply brief when
 13 Wells Fargo does not have an opportunity to respond. Plaintiff's arguments should be
 14 disregarded. See, e.g., Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007) ("The District
 15 Court need not consider arguments raised for the first time in a reply brief.").

16 **VIII. CONCLUSION**

17 Wells Fargo respectfully requests that the Court deny Plaintiff's Motion for
 18 Conditional Collective Action Certification and Notice with respect to PC/LAN Engineer
 19 5's on the ground that they are not "similarly situated" to Plaintiff and with respect to
 20 providing a second notice to PC/LAN Engineer 3's and 4's who have already received
 21 notice and an opportunity to opt in to this action. Furthermore, Wells Fargo requests that
 22 this Court deny Plaintiff's request for contact information of putative collective action
 23 members at this time and, if notice is ordered, that it be distributed by a third-party
 24 administrator by first class mail only, that it not be "corrective," and that the opt-in period
 25 be 60 days.

26 Dated: August 14, 2008

HODEL BRIGGS WINTER LLP

GLENN L. BRIGGS

By: /s/ GLENN L. BRIGGS

GLENN L. BRIGGS

Attorneys for Defendant